

Before the
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In re

**DISTRIBUTION OF SATELLITE
ROYALTY FUNDS**

**CONSOLIDATED DOCKET NO.
14-CRB-0011-SD (2010-13)**

**SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF MOTION TO
ENFORCE ORDER ON MOTION TO COMPEL**

CTV withheld responsive documents and expressly refused to comply with the Judges' order to provide a privilege log. The modest relief sought in the SDC's motion – compliance with the Judges' order and waiver of any assertion by CTV of privilege or work product – should be granted.

I. CTV Admits to Withholding Responsive Documents

CTV's production of the results of more than 600 regression models was "voluminous" because of the vast number of previously undisclosed models that were considered and rejected. But the production is far from complete.

The SDC's requests (with some variations) were for: "All documents *underlying, relating to, or supporting ...*" the regression specifications and results at issue. *See* SDC's Requests 4, 5, 6, 7, and 9 (emphasis added).¹ CTV does not contend it has produced all documents "underlying, relating to, or supporting" the regressions it produced. Rather, CTV acknowledges that it has withheld, at a minimum:

¹ CTV objects belatedly that the SDC's requests were "ambiguous," but fails to explain what was "ambiguous" about them. Opposition at 4-5. If CTV found the SDC's requests to be ambiguous, then it should have raised this objection when objections were due.

- “[C]ommunications between CTV counsel and CTV’s expert consultants that do not contain responsive factual information that is not being produced directly” (Opposition at 13); and
- Information concerning “other third party data” from SNL Kagan that was used in one or more of the regression models that CTV’s experts ran using satellite data (*id.* at 11).

Even if the Judges accept CTV’s contention that it “does not assert a work product objection to any internal communications of the expert consultants” (Opposition at 13), meaning there were *no* written communications between the expert consultants about the satellite regressions or any of the hundreds of cable regressions performed, the documents that CTV admits to withholding are responsive, and they should have been produced or logged in a privilege log.

Without communications relating to the regression results produced, the SDC can only infer the purposes of the tests. They are also denied an opportunity to test CTV’s implausible and ambiguous assertion that Dr. Heeb “did not review or consider the additional documents produced” (CTV Supplemental Responses at 8), which leaves open the possibility that he considered other documents containing similar information, or documents steering him away.

Without information concerning “other third party data” used in one or more of CTV’s satellite regression models, the SDC cannot fully test Dr. Heeb’s asserted reasons why he believes a satellite regression model does not reveal value, even though CTV now admits it is “feasible” to estimate a correlation between category minutes and the log of fees paid. CTV’s general description of the data suggests that CTV was able to obtain data that addressed the particular objections that Dr. Heeb raised, yet Dr. Heeb does not mention the satellite

regression results in his testimony. CTV's objection that the data is "proprietary" is waived, and is not a valid objection anyway. SDC Motion at 10-11.

CTV argues that it only needs to produce documents sufficient to "test" the "hypothesis or computational process of the testifying expert." Opposition at 7 (citing prior rulings from the Judges). CTV therefore claims that the SDC do not need information that would "more fully describe the regression specifications and the variables included and the reasons for the changes made." Opposition at 7 (quoting SDC Motion at 9). But the "reasons for the changes made" should correspond with the "hypotheses" being tested. Because some correlations will appear in some tests merely by chance, conducting tests without proposing hypotheses tends to lead to spurious correlations. Documents showing the "reasons for the changes made" in the hundreds of tests that CTV's experts conducted are relevant and responsive.

II. CTV Openly Defied the Judges' Order to Produce a Privilege Log

CTV is wrong to claim it had "no reason to expect that [communications between counsel and experts] were being requested." Opposition at 13. Both the SDC and the Judges made clear that not all communications with attorneys are protected by work product. *SDC's Motion to Compel* at 12 ("[T]he mere fact that an expert's consideration of an alternative methodology or specification was suggested by or communicated to counsel does not shield it from discovery."); *Order Granting the SDC's Motion to Compel* at 7 ("[I]f CTV or its counsel communicated with Professor Crawford, Dr. Heeb or any other expert ... documents embodying, memorializing or relating to such communications might be unprotected by the attorney-client privilege or work product rule and hence discoverable."). Moreover, even as

to communications that are work product, there are exceptions to work product immunity. *See, e.g., Moody v. IRS*, 654 F.2d 795 (D.C. Cir. 1981).

In a last-ditch effort to save itself from waiver, CTV offers that it “stands ready to compile a privilege log if the Judges so order.” Opposition at 15 n. 69. The Judges did “so order,” and CTV did not “stand ready.” CTV’s refusal to comply with the Judges’ order was express and flagrant. Its belated offer to comply is merely a feeble attempt to escape the consequences.

III. Documents Relating to All Regression Results Are Responsive

CTV makes the dumbfounding suggestion that it may not have been required to produce regression results other than a test that omitted MSO interaction variables, because this was the only “preliminary regression work” that the Judges identified “more particularly” in their order. Opposition at 4 n. 19. But the Judges referenced only that one regression test *because Professor Crawford denied remembering any others*.

Professor Crawford’s testimony is flatly contradicted by CTV’s supplemental production, on numerous points. The “one analysis” Professor Crawford recalled was the omission of MSO interaction variables. Crawford Tr. 1642:17-1645:25. In fact, he conducted hundreds of other analyses. Professor Crawford denied recalling a model without fixed effects. *Id.* at 1449:6-25. In fact, he tried dozens of models before ever applying fixed effects, and he ran almost every fixed effects model alternatively without fixed effects. Erdem Decl. ¶¶ 10 and 12. Professor Crawford said he was “sure” he did not run a specification where he “used fixed effects, but not at the system accounting period level.” Crawford Tr. 1450:1-23. In fact, he ran almost all of his fixed effects models at one or more other levels. Erdem Decl. ¶ 12. Professor Crawford denied recalling a model using the level

fees paid as a dependent variable. Crawford Tr. 1641:11-23. Actually, he ran dozens of such models, and models using other functional forms. Erdem Decl. ¶¶ 14 and 15.

CTV claims that Professor Crawford answered “forthrightly,” but does not even try to respond to most of these contradictions. Opposition at 8. Instead, CTV suggests that Professor Crawford could not remember the expansive number of tests when he testified “more than a year after he had finalized the regression analysis that he presented to the Judges.” Opposition at 9. The Judges can decide for themselves whether a lapse of memory is a plausible explanation for the contradictions. But at any rate, a witness’s faulty memory would be among the reasons why document production is necessary.

The SDC have not “deemphasized” their point that discovery is necessary to deter experts who might be tempted to “cast about” for a desired result. Opposition at 9 n. 37. To the contrary, the worst of the SDC’s suspicions have now been fully vindicated. CTV argues that “every Exhibit selected by Dr. Erdem that reports share results includes at least some regression versions that produced higher shares for CTV than the shares in the version of Dr. Crawford’s regression that the Judges ultimately relied upon,” suggesting that CTV’s experts did not select their final models based on results. *Id.* But a closer examination reveals otherwise.

This table presents the model results for CTV’s best implied shares from each of the exhibits to Dr. Erdem’s declaration:

CTV's Best Shares

Ex.	Year	Est.	PS	JSC	CTV	PTV	SDC	CCG
1	2013	FE_SOA	26.86	40.13	26.24	0	2.41	2.14
3	2010-13	--	1.68	0	97.03	0	0	0
4	2012	FE_SYS	46.9	9.4	28.3	11.7	0	1.9
5	2012	FE_SYS	24.9	30.6	20.0	20.1	0.4	3.2
6	2011	FE_SOA	32.25	16.18	26.32	20.13	0.7	3.03
10	2012	FE_SYS	46.9	9.4	28.3	11.7	0	1.9

And here are the model results showing CTV's lowest implied shares from each exhibit:

CTV's Worst Shares

Ex.	Year	Est.	PS	JSC	CTV	PTV	SDC	CCG
1	2010	FE_SOA	45.19	30.76	6.54	12.82	0.59	2.59
3	2010-11	--	51.25	0	23.52	21.37	0	3.0
4	2010	FE_SYS_ACCT	54.0	26.8	0.1	14.0	0	3.9
5*	2010-13	FE_SYS	12.1	82.0	0	1.2	0	4.0
6	2013	FE_SYS	20.41	49.04	13.34	13.69	0.18	1.96
10	2010	FE_SYS_ACCT	54.0	26.8	0.1	14.0	0	3.9

* Multiple models resulted in a 0% share for CTV.

Finally, here are the “original Waldfogel” results from the 2004-05 cable allocation case that CTV's experts used as a starting point for comparison (*see* Ex. 3), and the final results that Professor Crawford presented:

CTV's Starting and Ending Points

Testimony	Years	PS	JSC	CTV	PTV	SDC	CCG
Waldfogel	2004-05	24.75	42.42	22.91	6.56	0	3.31
Crawford Model 1	2010-13	23.95	35.19	17.18	18.75	0.69	4.23
Crawford Model 2	2010-13	23.40	35.13	19.49	17.02	0.71	4.24

Two of the models among “CTV's Best Shares” gave PTV an implausible 0%. Of the remaining four, only one model for a single year was within a factor of two (*i.e.*, no more than double or less than half) from the original Waldfogel results across all of the PS, JSC, and CTV shares:

Ex.	Year	Est.	PS	JSC	CTV	PTV	SDC	CCG
5	2012	FE_SYS	24.9	30.6	20.0	20.1	0.4	3.2

But when Professor Crawford’s team applied the same model across all four years, the results for CTV were lower than the results in Professor Crawford’s final models:

Ex.	Year	Est.	PS	JSC	CTV	PTV	SDC	CCG
5	2010-13	FE_SYS	25.7	37.5	15.8	16.7	0.6	3.2

Perhaps the most seductive feature of Professor Crawford’s final results was their apparent consistency with the results of other studies, at least in some categories. *See Final Allocation Determination*, 84 Fed. Reg. 3552, 3610 (Feb. 12, 2019) (“[T]he Judges are struck by the relative consistency of the results across the accepted methodologies.”). To present a model with results that differed widely from other models would have been self-defeating, as suggested, for example, by those models in which CTV’s experts highlighted low shares for JSC in yellow font. *See Erdem Decl.* ¶ 6. What CTV’s experts needed, and found among the hundreds tried, was a model with results that maximized CTV’s implied share without appearing to be facially inconsistent with the earlier Waldfogel results. Anything else would have shattered the illusion. Verisimilitude was as important as a high CTV share.

If CTV denies this is what happened, then it is all the more reason that the SDC require a complete production. If CTV’s experts did not “cast about” for an expected or desired result, then why did they test so many models over such a long time without disclosing them? CTV’s communications and analyses are responsive to the SDC’s discovery requests, and they might answer this question, thereby preventing any deception or memory lapse by a witness on the stand.

IV. CTV’s Remaining Arguments Seek to Relitigate the Judges’ Order

CTV renews its argument that “CTV is not presenting the cable regression as a study to be adopted again in this proceeding.” Opposition at 2. The Judges already rejected this argument, and it is irrelevant to the question of whether the Judges’ order should be enforced.

CTV's expert witnesses rely on the results of the cable regression, and are therefore presenting those results. The documents underlying Professor Crawford's testimony, including those related to his model search, also underlie Dr. Heeb's testimony.

As CTV points out, the SDC also rely on the results of studies presented in the cable allocation phase - the fixed-price surveys. Opposition at 3. All underlying information about those surveys in the SDC's experts' possession has been disclosed to the other parties. If the survey results had been selected from among hundreds of alternative surveys with diffuse results, and if the SDC's witnesses had been aware of those alternative surveys and had not disclosed them, then their testimony would have been deceptive. So too with CTV's witnesses.

CTV similarly argues that the Judges should have required production only of what CTV's experts in the satellite case say they actually considered, rather than documents that were considered only by other experts on CTV's team. Opposition at 5-6. Again, CTV's argument about what the Judges should have done differently is irrelevant at this stage. But documents considered in the course of the search for Professor Crawford's final cable regression model are documents underlying the model that is being presented by CTV's witnesses, even if those witnesses did not personally look at those documents. Opposing parties must have the opportunity to test every step of an econometric modelling process, even if a witness chooses to rely blindly on the work of others.²

² The Judges' *Order Denying SDC's Motion to Compel IPG*, No. 2008-2 CRB CD 2000-03 (Phase II) (Jan. 3, 2017) is easily distinguishable. In that case, the SDC requested documents that the expert witness never suggested either he or anyone else considered in the course of arriving at his final model.

CTV also seeks (ironically) to revive its “issue preclusion” argument that the Judges rejected. Opposition at 8. For the reasons already argued and decided, issue preclusion has no application here. At any rate, CTV’s supplemental production demonstrates that the architect of its cable regression model testified inaccurately and that the model was the result of a search through hundreds of undisclosed alternative models. What’s done is done, but the future is not in thrall to the lies of the past.

A motion for reconsideration, if CTV’s opposition were deemed to be one, should be granted only where “(1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice.” *Order Denying IPG Motion to Reconsider Preliminary Hearing Order*, No. 2008-2 CRB CD 2000-03 (Phase II) (May 14, 2013) (internal quotes omitted). None of these factors supports reconsideration of the Judges’ order compelling production. To the contrary, as is shown in Dr. Erdem’s declaration, the Judges may have prevented manifest injustice by bringing to light the improper methods by which CTV’s experts achieved and selected the results that they expected or desired.

V. CTV’s Request for a Hearing

If the Judges have questions for counsel or any witness, the SDC support CTV’s request for a hearing. Otherwise, the SDC do not see a need for a hearing. Either way, the SDC request a ruling expeditiously, so that the parties may be prepared for the hearing beginning on October 21, 2019.

VI. Conclusion

For the foregoing reasons, the SDC request the Judges to grant their motion.

Date: September 3, 2019

Respectfully submitted,

SETTLING DEVOTIONAL CLAIMANTS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically and served by filing on eCRB or by email on September 3, 2019, to all parties registered to receive electronic notices through eCRB.

/s/ Matthew J. MacLean
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Proof of Delivery

I hereby certify that on Tuesday, September 03, 2019, I provided a true and correct copy of the Reply in Support of Motion to Enforce Order on Motion to Compel to the following:

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American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), represented by Jennifer Criss, served via Email

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